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STATEMENT

OF

MORTON ROSENBERG
SPECIALIST IN AMERICAN PUBLIC LAW
CONGRESSIONAL RESEARCH SERVICE

BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH, NATURAL RESOURCES, AND REGULATORY AFFAIRS, HOUSE COMMITTEE ON GOVERNMENT REFORM

CONCERNING

# AUTHORITY OF A CONGRESSIONAL COMMITTEE TO REQUEST INFORMATION AND DOCUMENTS FROM AN AGENCY DURING AN OVERSIGHT PROCEEDING AND OPTIONS AVAILABLE TO COMPEL COMPLIANCE WITH SUCH REQUESTS

PRESENTED ON

APRIL 12, 2000

Mr. Chairman and Members of the Subcommittee

My name is Morton Rosenberg. I am a Specialist in American Public Law in the American Law Division of the Congressional Research Service (CRS). Among my areas of professional concern at CRS are the problems raised by the interface of Congress and the Executive which involve the scope and application of congressional oversight and investigative prerogatives. Over the years I have been involved in a number of investigations, including Iran-Contra, Rocky Flats, Whitewater, Travelgate, Filegate, and the Clinton impeachment inquiry, as well as other significant interbranch oversight disputes. My involvement has been advising Members and staff on such matters as organization of the probes, subpoena issuance and enforcement, the conduct of hearings, and contempt of Congress resolutions, and has required my dealing with a wide variety of legal and practical issues.

You have asked me here today to explain the range of options your Subcommittee may have in the face of a perceived nonresponsiveness by the Office of Management and Budget (OMB) to requests for information and documents with respect to matters within its jurisdictional purview. One instance involves the failure to conduct a complete and adequate search for documents encompassed by a subpoena. A second involves a refusal to provide information about "actual substantive changes" made by OMB during its review of Information Collection Requests (ICR's) submitted by agencies pursuant to the Paperwork Reduction Act (PRA). The third concerns an incomplete response to an explicit statutory direction to OMB to issue guidance to executive agencies as to how to respond to and comply with the requirements of the 1996 Congressional Review Act.

My discussion will proceed as follows. I will briefly describe the goals and purposes of legislative oversight and how our constitutional scheme of separated but shared powers impacts on the accomplishment of those goals and purposes. I will then outline the leading methods and processes by which congressional committees engage in oversight, distinguishing the unique and vital role of investigations from other facets of the oversight process. Next I will review the legal basis for investigative oversight, describe the essential tools available to committees to make it effective, the problems that may arise in enforcing the investigative prerogative, and the courses of action that are available to circumvent such problems. I will conclude with an assessment of the specific oversight concerns raised by the Subcommittee.

## I. The Constitutional Setting of Congressional Oversight

Throughout its history, Congress has engaged in oversight of the executive branch—the review, monitoring, and supervision of the implementation of public policy. The first several Congresses inaugurated such important oversight techniques as special investigations, reporting requirements, resolutions of inquiry, and use of the appropriations process to review executive activity. Contemporary developments, moreover, have increased the legislature's capacity and capabilities *to check on and check the Executive*. Public laws and congressional rules have measurably enhanced Congress's implied power under the Constitution to conduct oversight.

Congressional oversight of the Executive is designed to fulfill a number of important purposes and goals: to ensure executive compliance with legislative intent; to improve the efficiency, effectiveness, and economy of governmental operations; to evaluate program performance; to prevent executive encroachment on legislative powers and prerogatives; to investigate alleged instances of poor administration, arbitrary and capricious behavior, abuse,

waste, fraud and dishonesty; assess agency or officials' ability to manage and carry out program objectives; assess the need for new federal legislation; review and determine federal financial priorities; to protect individual rights and liberties; and to inform the public as to the manner in which its government is performing its public duties, among others.[1]

Legislative oversight is most commonly conducted through its budget, authorization, appropriations, confirmation, and investigative processes, and in rare instances, through impeachment. But the adversarial, often confrontational, and sometimes high profile nature of congressional investigations sets it apart from the more routine, accommodative facets of the oversight process experienced in authorization, appropriations or confirmation exercises. While all aspects of legislative oversight share the common goals of informing Congress so as to best accomplish its tasks of developing legislation, monitoring the implementation of public policy, and of disclosing to the public how its government is performing, the inquisitorial process also sustains and vindicates Congress' role in our constitutional scheme of separated powers and checks and balances. The rich history of congressional investigations from the failed St. Clair expedition in 1792 through Teapot Dome, Watergate, Iran-Contra and Whitewater has established, in law and practice, the nature and contours of congressional prerogatives necessary to maintain the integrity of the legislative role in that constitutional scheme.

It is important to understand that the shape and contours of the legislative oversight process are dictated or directly influenced by our constitutional scheme of separated powers and checks and balances. That scheme envisions and establishes a perpetual struggle for policy control between Congress and the Executive. In practice, the powers of both are too incomplete for one to gain total control. Legislative oversight is the mechanism that attempts to assure that Congress' will is carried out and that Executive power does not overwhelm congressional prerogatives. The complete and correct picture, then, I believe is not that of congressional dominance or executive recalcitrance, but a dynamic process of continuous sparring, confrontation, negotiation, and ultimate accommodation. Occasionally we have monumental clashes. It is in those instances that the congressional power has been refined and defined.

## II. Investigative Oversight

### A. The Legal Basis for Oversight

Numerous Supreme Court precedents establish and support a broad and encompassing power in the Congress to engage in oversight and investigation that reaches all sources of information that enable it to carry out its legislative function. In the absence of a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees, have virtually, plenary power to compel information needed to discharge their legislative function from executive agencies, private persons and organizations, and within certain constraints, the information so obtained may be made public.

More particularly, although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the

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[1] For a general overview of the oversight process see Congressional Research Service, Congressional Oversight Manual (June 25, 1999) (CRS Report No. RL 30240).

purposes of performing its legitimate functions, numerous decisions of the Supreme Court have firmly established that the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress.[2] Thus, in *Eastland v. United States Servicemen's Fund* the Court explained that "[t]he scope of its power of inquiry ... is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[3] In *Watkins v. United States* the Court further described the breadth of the power of inquiry: "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statues."[4] The Court went on to emphasize that Congress' investigative power is at its peak when the subject is alleged waste, fraud, abuse, or maladministration within a government department. The investigative power, it stated, "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste."[5] "[T]he first Congresses", it continued, held "inquiries dealing with suspected corruption or mismanagement of government officials"[6] and subsequently, in a series of decisions, "[t]he Court recognized the danger to effective and honest conduct of the Government if the legislative power to probe corruption in the Executive Branch were unduly hampered."[7] Accordingly, the Court stated, it recognizes "the power of the Congress to inquire into and publicize corruption, maladministration, or inefficiencies in the agencies of Government."[8]

But while the congressional power of inquiry is broad, it is not unlimited. The Supreme Court has admonished that the power to investigate may be exercised only "in aid of the legislative function"[9] and cannot be used to expose for the sake of exposure alone. The *Watkins* Court underlined these limitations: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress ... nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the Congress."[10] Moreover, an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.[11] But once having established its jurisdiction and

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2 *E.g., McGrain v. Daugherty,* 272 U.S. 135 (1927); *Watkins v. United States,* 354 U.S. 178 (1957); *Barenblatt v. United States,* 360 U.S. 109 (1950); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Nixon v. Administrator of General Services,* 433 U.S. 425 (1977); see also, *United States v. A.T.T.,* 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

3 Rastland, 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

4 354 U.S. at 187.

5 *Id.*

6 *Id.* at 182.

7 *Id.* at 194-95

8 *Id.* at 200 n. 33.

9 *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880).

10 *Watkins v. United States, supra,* 354 U.S. at 187.

11 *United States v. Rumely,* 345 U.S. 41, 42, 44 (1953); *Watkins v. United States, supra,* 354 U.S. at 198.

authority, and the pertinence of the matter under inquiry to its area of authority, a committee's investigative purview is substantial and wide-ranging.[12]

The foundation cases establishing Congress' broad power to probe are illustrative and illuminating. They arose out of the Teapot Dome investigations, the 1920's scandal regarding oil company payoffs to officials in the Harding Administration. A major concern of the congressional oversight investigation was the failure of Attorney General Harry M. Daugherty's Justice Department to prosecute the alleged government malefactors. When congressional committees attempting to investigate came up against refusals by subpoenaed witnesses to provide information, the issue went to the Supreme Court and provided it with the opportunity to issue a seminal decision describing the constitutional basis and reach of congressional oversight. In *McGrain v. Daugherty,*[13] the Supreme Court focused specifically on Congress' authority to study "charges of misfeasance and nonfeasance in the Department of Justice." The Court noted with approval that "the subject to be investigated" by the congressional committee "was the administration of the Department of Justice -- whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes ...."[14] In its decision, the Court sustained the contempt arrest of the Attorney General's brother for withholding information from Congress, since Congress "would be materially aided by the information which the investigation was calculated to elicit."[15] Thus, the Supreme Court unequivocally precluded any blanket claim by the Executive that oversight could be barred regarding "whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings."[16]

In another Teapot Dome case that reached the Supreme Court, *Sinclair v. United States,*[17] a different witness at the congressional hearings refused to provide answers, and was prosecuted for contempt of Congress. The witness had noted that a lawsuit had been commenced between the government and the Mammoth Oil Company, and declared, "I shall reserve any evidence I may be able to give for those courts. . . and shall respectfully decline to answer any questions propounded by your committee."[18] The Supreme Court upheld the conviction of the witness, who had appeared voluntarily, for contempt of Congress. The Court considered and rejected in unequivocal terms the witness's contention that the pendency of lawsuits gave an excuse for withholding information. Neither the laws directing that such lawsuits be instituted, nor the lawsuits themselves, "operated to divest the Senate, or the committee, of power further to investigate the actual administration of the land laws."[19]

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12 *Wilkinson v. United States,* 365 U.S. 408-09 (1961).

13 273 U.S. 135, 151 (1927).

14 *Id.* at 177.

15 *Id.*

16 *Id.*

17 279 U.S. 263 (1929).

18 *Id.*, at 290.

19 *Id.* at 295.

The Court further explained: "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits."[20] In other words, those persons having evidence in their possession, including officers and employees of executive agencies, can not lawfully assert that because lawsuits are pending involving the government, "the authority of [the Congress], directly or through its committees, to require pertinent disclosures" is somehow "abridged."

The Supreme Court in the Teapot Dome cases therefore enunciated in the clearest manner the independence of Congress' power to probe. The coincidental focus on the Justice Department and the ability of committees to look deeply into all aspects of its sensitive law enforcement function underlines the potential breadth of that power with respect to other Executive Branch agencies and private sector entities as well.

B. The Essential Tools of Oversight

1. The Subpoena Power

The power of inquiry, with the accompanying process to enforce it, has been deemed "an essential and appropriate auxiliary to the legislative function."[21] A properly authorized subpoena issued by a committee or subcommittee has the same force or effect as a subpoena issued by the parent House itself.[22] To validly issue a subpoena, individual committees or subcommittees must be delegated this authority. Both Senate[23] and House[24] rules presently empower all standing committees and subcommittees to require the attendance and testimony of witnesses and the production of documents. Special or select committees must be specifically delegated that authority by Senate or House resolution.[25] The rules or practices of standing committees may restrict the issuance of subpoenas only to full committees or in certain instances allow issuance by a committee chairman alone, with or without the concurrence of the ranking minority member.

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[20] *Id.* at 295.

[21] *McGrain v. Daugherty, supra,* 273 U.S. at 174-75.

[22] *Id.* at 158.

[23] Senate Rule XXVI(1)(All Senate rules hereinafter cited were in effect as of 1999 unless otherwise indicated and may be found in Sen. Doc. No. 106-6 compiled by the Senate Committee on Rules and Administration).

[24] House Rule XI(2)(m)(1)(All House rules hereinafter cited were in effect as of 1999 unless otherwise indicated and may be found in Rules Adopted By The Committee of the House of Representatives, compiled by the House Rules Committee as a committee print).

[25] See, *e.g.,* S.Res. 23, 100th Cong. (Iran-Contra); Sen. Res. 495, 96th Cong. (Billy Carter/Libya).

Committees may issue subpoenas in furtherance of an investigation within their subject matter jurisdiction as defined by Senate[26] and House[27] rules which confer both legislative and oversight jurisdiction. Subpoenas may be issued on the basis of either source of authority.

A witness seeking to challenge the legal sufficiency of a subpoena, *i.e.,* the committee's authority, alleged constitutional rights violations, subpoena breadth, has only limited remedies available to raise such objections. The Supreme Court has ruled that courts may not enjoin the issuance of a congressional subpoena, holding that the Speech or Debate Clause of the Constitution[28] provides "an absolute bar to judicial interference" with such compulsory process.[29] As a consequence, a witness' sole remedy generally is to refuse to comply, risk being cited for contempt, and then raise objections as a defense in a contempt prosecution.

Challenges to the legal sufficiency of subpoenas must overcome formidable judicial obstacles. The standard to be applied in determining whether the congressional investigating power has been properly asserted was articulated in *Wilkinson* v. *United States*: (1) the committee's investigation of the broad subject matter area must be authorized by Congress; (2) the investigation must be pursuant to "a valid legislative purpose"; and (3) the specific inquiries must be pertinent to the broad subject matter areas which have been authorized by the Congress.[30]

With respect to authorization, a committee's authority derives from the enabling rule or resolution of its parent body. In construing the scope of such authorizations, the Supreme Court has adopted a mode of analysis not unlike that ordinarily followed in determining the meaning of a statute: it looks first to the words of the authorizing rule or resolution itself, and then, if necessary, to the usual sources of legislative history, including floor statements, reports and past committee practice.[31]

As to the requirement of "valid legislative purpose," the Supreme Court has made it clear that Congress does not have to state explicitly what it intends to do as a result of an investigation.[32] When the purpose asserted is supported by reference to specific problems which in the past have been, or in the future may be, the subject of appropriate legislation, it has been held that a court cannot say that a committee of Congress exceeds its power when it seeks information in such areas.[33]

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[26] Senate Rule XXV.

[27] House Rule X.

[28] U.S. Const. Art. I, sec. 6, cl. 1.

[29] *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 503-07 (1975).

[30] 365 U.S. 399, 408-09 (1961).

[31] *Barenblatt v. United States,* 360 U.S. 109, 117 1959); *Watkins v. United States, supra,* 354 U.S. at 209-215.

[32] *In re Chapman,* 166 U.S. 661, 669 (1897).

[33] *Shelton v. United States,* 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969).

Also, in determining the pertinency of questions to the subject matter under investigation, the courts have required only that the specific inquiries be reasonably related to the subject matter under investigation.[34] An argument that pertinence must be shown "with the degree of explicitness and clarity required by the Due Process Clause" has been held to confuse the standard applicable in those rare cases when the constitutional rights of individuals are implicated by congressional investigations with the far more common situation of the exercise of legislative oversight over the administration of the law which does not involve an individual constitutional right or prerogative. It is, of course, well established that the courts will intervene to protect constitutional rights from infringement by Congress, including its committees and members.[35] But "[w]here constitutional rights are not violated, there is no warrant to interfere with the internal procedures of Congress."[36]

Finally, it is useful to note that the obligation to comply with a legitimate committee request for information and documents is not dependent on the issuance of compulsory process. As indicated previously, the witness found in contempt in the *Sinclair* case for refusing to respond to questions posed by the Committee appeared *voluntarily*. Further, the courts have held that the legal obligation to surrender documents requested by the chairman of a congressional committee arises at the time of the official request[37], and have agreed in construing 18 U.S.C. 1505, a statute proscribing the obstruction of congressional proceedings, that the statute is broad enough to cover obstructive acts in anticipation of a subpoena.[38] Thus a refusal to comply with a letter request could engender a contempt citation in the proper circumstances.

2. Congressional Grants of Immunity

The Fifth Amendment to the Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself ... " The privilege against self-incrimination is available to a witness in a congressional investigation.[39] When a witness before a committee asserts his constitutional privilege, the committee may obtain a court order which compels him to testify and grants him immunity against the use of his

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[34] *Sinclair v. United States, supra,* 279 U.S. at 299; *Ashland Oil, Inc. v. F.T.C.,* 409 F.Supp. at 305.

[35] *See, e.g., Yellin v. United States,* 374 U.S. 109, 143, 144 (1969); *Watkins v. United States, supra; United States v. Ballin,* 144 U.S. 1, 5 (1892).

[36] *Exxon Corporation v. F.T.C.,* 589 F.2d 582, 590 (D.C. Cir. 1978).

[37] See, *e.g., Ashland Oil Co. v. FTC*, 598 F.2d 977, 980-81 (D.C. Cir. 1976).

[38] See, *e.g., United States v. Mitchell*, 877 F.2d 297, 300-01 (9th Cir. 1979)("To give section 1505 the protective force it was intended, corrupt endeavors to influence congressional investigations must be proscribed even when they occur prior to formal committee authorization."); *United States* v. *Tallent*, 407 F.Supp 878, 888 (.N.D.Ga. 1975); *United States v. North*, 708 F.Supp. 372 (D.D.C. 1988); *United States v. North*, 708 F.Supp. 389 (D.D.C. 1988)(holding that the defendants' acts constituted the felony offenses of obstruction of Congress and of making false statements, even though the inquiry letters and responses occurred in the absence of committee votes and subpoenas or oaths).

[39] See *Watkins v. United States*, 354 U.S. 178 (1957); *Quinn v. United States*, 349 U.S. 155 (1955).

testimony and information derived from that testimony in a subsequent criminal prosecution. He may still be prosecuted on the basis of other evidence.

The privilege against self-incrimination is an exception to the public's right to every person's evidence. However, a witness' Fifth Amendment privilege can be restricted if the government chooses to grant him immunity. Immunity is considered to provide the witness with the constitutional equivalent of his Fifth Amendment privilege.[40] Immunity grants may be required in the course of an investigation because "many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[41] Such grants may be appropriate when a committee is convinced that the testimony elicited will produce new or vital facts that would otherwise be unavailable or to allow a witness to implicate persons of greater rank or authority. Grants of immunity have figured prominently in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter).

The scope of the immunity which is granted, and the procedure to be employed, are outlined in 18 U.S.C. §§ 6002, 6005. If a witness before the House or Senate or a committee or subcommittee of either body asserts his privilege, or if a witness who has not yet been called is expected to assert his privilege, an authorized representative of the House or of the committee may apply to a federal district court for an order directing the individual to testify or provide other information sought by the Congress.[42] If the testimony is to be before the full House or Senate, the request for the court order must be approved by an affirmative vote of a majority of the Members present of the House or Senate. If the testimony is to be given before a committee or subcommittee, the request for the order must be approved by an affirmative vote of two-thirds of the Members of the full committee.[43]

At least ten days prior to applying to the court for the order, the Attorney General[44] must be notified of the Congress' intent to seek the order,[45] and issuance of the order will be delayed by the court for as much as twenty additional days at the request of the Attorney General.[46] Notice to the Attorney General is required so that he can identify in his files any information which would provide an independent basis for prosecuting the witness, and place that information under seal. Neither the Attorney General nor an independent counsel would have a right to veto a committee's application for immunity.[47] The role of the court in issuing the order is ministerial and therefore, if the procedural requirements under the statutes are met, the court may not refuse to issue the order or impose conditions on the grant of

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40 See generally *Kastigar v. United States*, 406 U.S. 441 (1972).

41 *Kastigar v. United States,* 406 U.S. at 446.

42 18 U.S.C. § 6005(a); See also *Application of Senate Permanent Subcommittee on Investigations,* 655 F.2d 1232 (D.C. Cir.), *cert. denied,* 454 U.S. 1084 (1981).

43 18 U.S.C. § 6005(b).

44 Notice should be given to an independent counsel where one has been appointed, since he would have the powers usually exercised by the Justice Department. See 28 U.S.C. § 594.

45 18 U.S.C. § 6005(b). The Justice Department may waive the notice requirement. *Application of Senate-Permanent Subcommittee on Investigations,* 655 F.2d at 1236.

46 18 U.S.C. § 6005(c).

47 See H.R. Rept. No. 91-1549, 91st Cong., 2d Sess. 43 (1970).

immunity.[48] However, although the court lacks power to review the advisability of granting immunity, it might be able to consider the jurisdiction of Congress and the committee over the subject area and the relevance of the information that is sought to the committee's inquiry.[49]

After an immunity order has been issued by the court and communicated to the witness by the chairman, the witness can no longer decline to testify on the basis of his privilege, "but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."[50] The immunity that is granted is "use" immunity, not "transactional" immunity.[51] That is, neither the immunized testimony that the witness gives to the committee, nor information derived from that testimony, may be used against him in a subsequent criminal prosecution, except one for falsely testifying to the committee or for contempt. However, he may be convicted of the crime (the "transaction") on the basis of evidence independently obtained by the prosecution and sealed before his congressional testimony, and/or on the basis of information obtained after his congressional appearance but which was not derived, either directly or indirectly, from his congressional testimony.

In determining whether to grant immunity to a witness, a committee may consider, on the one hand, its need for his testimony in order to perform its legislative, oversight, and informing functions, and on the other, the possibility that the witness' immunized congressional testimony could jeopardize a successful criminal prosecution against him. If a witness is prosecuted after giving immunized testimony, the burden is on the prosecutor to establish that the case was not based on the witness' previous testimony or evidence derived therefrom.[52]

Appellate court decisions reversing the convictions of key Iran-Contra figures Lt. Colonel Oliver North[53] and Rear Admiral John Poindexter[54] appear to make the prosecutorial burden substantially more difficult, if not insurmountable, in high profile cases. Despite extraordinary efforts by the Independent Counsel and his staff to avoid being exposed to any of North's or Poindexter's immunized congressional testimony, and the submission of sealed packets of evidence to the district court to show that the material was obtained independently of any immunized testimony to Congress, the appeals court in both cases remanded the cases for a further determination whether the prosecution had directly or indirectly used immunized testimony.

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[48] *Id.* See also S.Rept. No. 91-617, 91st Cong., 1st Sess. 145 (1969); *Application of U.S. Senate Select Committee on Presidential Campaign Activities*, 361 F.Supp. 1270 (D.D.C. 1973).

[49] *Application of U.S. Senate Select Committee,* 361 F.Supp. at 1278-79.

[50] 18 U.S.C. § 6002.

[51] The constitutionality of granting a witness only use immunity, rather than transactional immunity, was upheld in *Kastigar v. United States, supra.*

[52] *Kastigar v. United States, supra,* 406 U.S. at 460.

[53] *United States v. North,* 910 F.2d 843 (D.C. Cir.), *modified,* 920 F.2d 940 (D.C. Cir. 1990) cert. denied, 111 S.Ct. (1991).

[54] 951 F.2d 369 (D.C. Cir. 1991).

While the *North* and *Poindexter* rulings in no way diminish a committee's authority to immunize testimony or the manner in which it secures immunity pursuant to the statute, it does alter the calculus as to whether to seek such immunity. Independent Counsel Lawrence E. Walsh observed that "[t]he legislative branch has the power to decide whether it is more important perhaps even to destroy a prosecution than to hold back testimony they need. They make that decision. It is not a judicial decision or a legal decision but a political decision of the highest importance."[55] It has been argued that the constitutional dimensions of the crisis created by the Iran-Contra affair required the type of quick, decisive disclosures that could result from a congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process.[56] Under this view, the demands of a national crisis may justify sacrificing the criminal prosecution of those involved in order to allow Congress to uncover and make public the truth of the matter at issue. The role of Congress as overseer, informer, and legislator arguably warrants this sacrifice. The question becomes more difficult as the sense of national crisis in a particular circumstance is less acute, and the object is, for example, to trade-off a lesser figure in order to reach someone higher up in a matter involving "simple" fraud, abuse or maladministration at an agency. In the end, case-by-case assessments by congressional investigators will be needed, guided by the sensitivity that these are political judgments.

3. Grants of Special Investigative Powers

Often in high profile oversight investigative proceedings, focusing on scandals, alleged abuses of authority, suspected illegal conduct, or other unethical behavior, the Houses will vest standing committees, or specially created, temporary panels, with special investigative authorities. The most common is staff deposition authority. Thus, committees normally rely on informal staff interviews to gather information preparatory to investigatory hearings. However, with more frequency in recent years, congressional committees have utilized staff conducted depositions as a tool in exercising the investigatory power.[57] Staff depositions afford a number of advantages for committees engaged in complex investigations. Staff depositions may assist committees in obtaining sworn testimony quickly and confidentially without the necessity of Members devoting time to lengthy hearings which may be unproductive because witnesses do not have the facts needed by the committee or refuse to cooperate. Depositions are conducted in private and may be more conducive to candid responses than would be the case at a public hearing. Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing. Depositions can enable a committee to prepare for the questioning of witnesses at a hearing or provide a screening process which can obviate the need to call some witnesses. The deposition process also allows questioning of witnesses outside of Washington thereby avoiding the inconvenience of conducting field hearings requiring the presence of Members.

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[55] Lawrence E. Walsh, The Independent Counsel and the Separation of Powers, 25 Hous. L. Rev. 1, 9 (1988).

[56] Michael Gilbert, The Future of Congressional Use Immunity After *United States, v. North,* 30 Amer. Crim.L.Rev. 417, 430-31 (1993). See also, Arthur L. Limon and Mark A. Belnick, Congress Had to Immunize North, Wash. Post, July 29, 1990, at p. C7.

[57] *E.g.,* S. Res. 229, 103d Cong. (Whitewater); S. Res. 23, 100th Cong. (Iran-Contra); H. Res. 12, 100th Cong. (Iran-Contra); H. Res. 320, 100th Cong. (impeachment proceedings of Judge Alcee Hastings); S. Res. 495, 96th Cong. (Billy Carter/Libya).

Certain disadvantages may also inhere. Unrestrained staff may be tempted to engage in tangential inquiries. Also depositions present a "cold record" of a witness's testimony and may not be as useful for Members as in person presentations. Finally, in the current absence of any definitive case law precedent, legal questions may be raised concerning the ability to enforce a subpoena for a staff deposition by means of contempt sanctions, and to the applicability to such a deposition of various statutes that proscribe false material statements.[58]

At present neither House has rules that expressly authorize staff depositions. On a number of occasions such specific authority has been granted pursuant to Senate and House resolutions.[59] When granted, a committee will normally adopt procedures for taking depositions, including provisions for notice (with or without a subpoena), transcription of the deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved.[60]

In addition, standing and special committees have been given international information gathering authority, the authority to access tax information in the custody of the Internal Revenue Service, and the authority to participate in judicial proceeding.[61]

C. Enforcement of the Investigative Power

1. The Contempt Power

While the threat or actual issuance of a subpoena often provides sufficient leverage for effective compliance with investigative information demands, it is through the contempt power that Congress may act with ultimate force in response to actions which obstruct the legislative process in order to punish the contemnor and/or to remove the obstruction. The Supreme Court early recognized the power as an inherent attribute of Congress' legislative authority, reasoning that if it did not possess this power, it "would be exposed to every indignity and interruption that rudeness, caprice or even conspiracy may mediate against it."[62]

There are three different kinds of contempt proceedings available. Both the House and Senate may cite a witness for contempt under their inherent contempt power or under a statutory criminal contempt procedure. The Senate also has a third option, enforcement by

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[58] See Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report No. 95-949 A, December 3, 1999 (suggesting that the criminal contempt procedure would be available if a committee adopted rules of procedure providing for Member involvement if a witness raises objections and refuses to answer; and that analogous case law under false statements and obstruction of Congress statutes would support prosecutions for false statements made during a deposition.).

[59] See examples cited in Shampansky note 63, *supra*.

[60] See, *e.g.*, Senate Permanent Committee on Investigations Rule 9; House Iran-Contra Committee Rule 6, H. Res. 12, 133 Cong. Rec. 822 (1987).

[61] For a compilation of selected grants of special authorities since Watergate, see Congressional Oversight Manual, *supra* note 1 at 86-88.

[62] *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204 (1821).

means of a statutory civil contempt procedure. The three proceedings may be briefly described.[63]

(a) Inherent Contempt

Under the inherent contempt power, the individual is brought before the House or Senate by the Sergeant-at-Arms, tried at the bar of the body, and can be imprisoned in the Capitol jail. The purpose of the imprisonment or other sanction may be either punitive or coercive. Thus, the witness can be imprisoned for a specified period of time as punishment, or for an indefinite period (but not, at least in the case of the House, beyond the end of the Congress) until he agrees to comply. When a witness is cited for contempt under the inherent contempt process, prompt judicial review is available by means of a petition for a writ of *habeas corpus.* In an inherent contempt proceeding, although Congress would not have to afford the contemnor the whole panoply of procedural rights available to a defendant in a criminal case, notice and an opportunity to be heard would have to be granted. Also, some of the requirements imposed by the courts under the statutory criminal contempt procedure might be mandated by the due process clause in the case of inherent contempt proceedings.[64]

The inherent contempt power has not been exercised by either House in over sixty years because it has been considered to be too cumbersome and time consuming for a modern Congress with a heavy legislative workload that would be interrupted by a trial at the bar.

(b) Statutory Contempt

Recognizing the problems with use of the inherent contempt process, a statutory criminal contempt procedure was enacted in 1857 which, with only minor amendments, is codified today at 2 U.S.C. §§192 and 194. Under 2 U.S.C. § 192, a person who has been subpoenaed to testify or produce documents before the House or Senate or a committee and who fails to do so, or who appears but refuses to respond to questions, is guilty of a misdemeanor, punishable by a fine of up to $1,000 and imprisonment for up to one year. Section 194 establishes the procedure to be followed if the House or Senate refers a witness to the courts for criminal prosecution. A contempt citation must be approved by the subcommittee, the full committee, and the full House or Senate (or by the presiding officer if Congress is not in session). The criminal procedure is punitive in nature. It is not coercive because a witness generally will not be able to purge himself by testifying or supplying subpoenaed documents after he has been voted in contempt by the committee and the House or the Senate. Under the statute, after a contempt has been certified by the President of the Senate or the Speaker of the House, it is the "duty" of the U.S. Attorney "to bring the matter before the grand jury for its action." It remains unclear whether the "duty"

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[63] For a more comprehensive treatment of the history and legal develpment of the congressional contempt power, see Jay R. Shampansky, Congress' Contempt Power, CRS Report No. 86-83A, February 28, 1986.

[64] See, *Groppi v. Leslie,* 404 U.S. 496 (1972).

of the U.S. Attorney to present the contempt to the grand jury is mandatory or discretionary, since the sparse case law that is relevant to the question provides conflicting guidance".[65]

This potential conflict between the statutory language of §194 and the U.S. Attorney's prosecutorial discretion was highlighted by the inability of the House of Representatives in 1982 to secure a contempt prosecution against the Administrator of the Environmental Protection Agency, Ann Burford. Burford, at the direction of President Reagan, had asserted executive privilege as grounds for refusing to respond to a subpoena demand for documents. She was cited for contempt by the full House and the contempt resolution was certified by the Speaker and forwarded to the U.S. Attorney for the District of Columbia for presentment to the grand jury. Relying on his prosecutorial discretion he deferred doing so pending a court challenge to the contempt citation, and after that suit was dismissed he further delayed submission while settlement negotiations were proceeding. Ultimately the Executive turned over the disputed documents and the House withdrew its contempt citation.

The Burford controversy may be seen as unusual, involving highly sensitive political issues of the time. In the vast majority of cases there is likely to be no conflict between the interests of the two political branches, and the U.S. Attorney can be expected to initiate prosecution in accordance with § 194.

(c) Civil Contempt

As an alternative to both the inherent contempt power of each House and criminal contempt, Congress enacted a civil contempt procedure which is applicable only to the Senate.[66] Upon application of the Senate,[67] the federal district court is to issue an order to a person refusing, or threatening to refuse, to comply with a Senate subpoena. If the individual still refuses to comply, he may be tried by the court in summary proceedings for contempt of court, with sanctions being imposed to coerce his compliance. Civil contempt might be employed when the Senate is more concerned with securing compliance with the subpoena or with clarifying legal issues than with punishing the contemnor. Civil contempt can be more expeditious than a criminal proceeding and it also provides an element of flexibility, allowing the subpoenaed party to test his legal defenses in court without necessarily risking a criminal prosecution. Civil contempt is not authorized for use against executive branch officials refusing to comply with a subpoena.

(d) Alternatives to Contempt

When an executive branch official refuses to comply with a congressional subpoena and the dispute cannot be resolved by negotiation and compromise, none of the three types of contempt proceedings may be completely satisfactory. The statutory civil contempt procedure in the Senate is inapplicable in the case of a subpoena to an executive branch official. Inherent contempt has been described as "unseemly" and cumbersome. And if the

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[65] See Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 NYUL Rev. 563 (1991); Hearing, "Prosecution of Contempt of Congress," Before the Subcomm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary, 98th Cong. 1st Sess. 21-35 (1983) (Statement and Testimony of Stanley Brand).

[66] See 2 U.S.C. 288d and 28 U.S.C. 1364.

[67] Usually brought by the Senate Legal Counsel. 2 U.S.C 288 d(a).

criminal contempt method is utilized, the U.S. Attorney, who is an executive branch appointee may, as occurred in the Burford case, rely on the doctrine of prosecutorial discretion as grounds for deferring seeking an indictment. Further, with the expiration of the independent counsel, the often suggested possibility of seeking a referral to an independent counsel is no longer unavailable.

There are, however, several other alternatives to the three modes of contempt in the case of an incooperative executive official. The most promising and possibly most expeditious route for a House committee would be to seek a resolution of the body authorizing it to bring a civil suit seeking enforcement of the subpoena. There is precedent for bringing such civil suits under the grant of federal question jurisdiction in 28 U.S.C. 1331, and the Department of Justice has indicated that it would approve of this course of action to resolve such interbranch disputes.[68] Other alternatives include cutting the appropriations of the department or agency withholding the requested information, holding up confirmations of agency officials, or, in an exceptional case, seeking impeachment of the official in question.

## III. Application of the Congress's Oversight Prerogatives: The Practicalities of Enforcing Information Gathering Demands Against Executive Branch Officials

Congress' oversight and investigatory powers with respect to the administrative bureaucracy, when viewed in their totality, are so formidable that legitimate requests for information by committees with proper jurisdiction that are pursued with a sufficient degree of tenacity and with a sensitivity for individual situational differences and limitations, should succeed in the vast majority of contested instances. My experience over almost three decades with such interbranch conflicts is that just the credible threat of a subpoena is usually sufficient to induce the release of requested information in most instances, and that the actual issuance of compulsory process normally encourages meaningful negotiations that result in satisfactory accommodations in most situations that reach that stage. I am aware of only 10 instances in history, all since 1975, in which executive branch officials (all of whom were at the cabinet-level) were cited for contempt. In only one was there vote on the floor of a House[69], the rest being issued by subcommittees[70] and committees[71]. Nine of the ten were resolved to the satisfaction of the committees seeking the information, and each of those involved claims of executive privilege by the President. The tenth did not involve a presidential claim of privilege, and was not brought to the House floor for a vote and was not pursued further.[72]

The high degree of committee success in these confrontations appears attributable to the reluctance of most Administrations, and most officials within an Administration, to be faced

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[68] See, *e.g.*, 10 Op. OLC 91 (1986).

[69] H. res. 632, 97th Cong., 128 Cong. Rec. 31746-76 (1982) (contempt of EPA Administrator Anne Burtford).

[70] Secretary of Commerce Rogers C.B. Morton (1975); Interior Secretary Joseph Chlifono (1978); Energy Secretary Charles Duncan (1980); Energy Secretary James Edwards (1980); Attorney General William French Smith (1984).

[71] Secretary of State Henry Kissinger (1975); Interior Secretary James G. Watt (1982); White House Counsel John M. Quinn (1996); Attorney General Janet Reno (1998).

[72] Reno contempt, H.R. Rept. No. 105-728, 105th Cong., 2d Sess. (1998).

with a contempt citation, even with the almost certain knowledge such a citation will not lead to a criminal prosecution. Rather the resultant media attention and public criticism has been generally seen as unacceptable. And although there are circumstances when a congressional subpoena serves as welcome cover for officials to "involuntarily" turn over documents to committees, for the most part there is a similar pressure on officials to avoid the glare of publicity and public suspicion, and the time consuming burden of defending a withholding.

Despite the attractive power of compulsory process, it normally should not be the weapon of first resort, and in some instances may not be the appropriate vehicle to achieve the legislative goal. A subpoena is often best not issued until the informal processes of negotiations and accommodation have become unproductive. Even when that point is reached, a successful negotiating (and face saving) device for agencies has been for committees to authorize issuance of a subpoena by the chair in his discretion or by a time certain if withholding continues. The time delay has often allowed agencies to rethink positions in the light of the committee's action.

There are also circumstances when compulsory process and the threat of criminal contempt are inappropriate to achieving committee goals. If information is needed quickly, criminal contempt is a time consuming route and will not actually result in a judicial order to produce. Rather, it only punishes the failure to produce the desired documents or information. To get a production order, civil enforcement is necessary. As indicated previously, that would require a House resolution authorizing the committee to go to court for an enforcement order. The institutional downside is that what is essentially a political dispute between the branches would be left to the uncertainty and often time consuming nature of the judicial process.

Instead of prosecution or litigation, Congress has a host of other tools to secure information and testimony it needs. It can delay action on bills favored by the Administration or pass legislation that makes mandatory action that is now discretionary and is not being done. The power of the purse can be discretely utilized to put pressure on the Administration. Holds may be put on the Senate confirmation process with respect to particular or groups of individuals. Ultimately, Congress may use the power of impeachment.

A brief examination of the three areas of Subcommittee concern with OMB actions suggests that two may be more amenable to different enforcement methods.

For example, your dispute with OMB with respect to the Paperwork Reduction Act[73] appears to essentially involve your interest is knowing whether the Office of Information and Regulatory Affairs (OIRA) is effectively carrying out its statutory mission to reduce the burden imposed by information collection requests (ICR's) by agencies. The statute empowers OIRA to review and reject an ICR in part or in its entirety.[74] The statute requires that the information collection burden be reduced by stated percentages (10% each in fiscal

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[73] 44 U.S.C.A. 3501 *et seq.* (Suppl. 1999).

[74] 44 U.S.C. 3507.

years 1996 and 1997, and 5% each in fiscal years 1998, 1999 and 2000).[75] OMB has conceded that OIRA has failed to meet these statutory objectives in each year so far. Your Subcommittee seeks information about the effectiveness of OIRA's administration of the PRA, including, among other things, "actual substantive changes" made by OIRA during its review of agency ICR's. OMB's response is that "it is our view that a substantive change is 'made by OMB' only when OMB exercises its authority to disapprove a collection or when an agency withdraws a collection during our review." OMB does not deny that it may object to certain requirements in an ICR and that an agency may agree to delete them as a condition of approval for the rest of the ICR (or that OIRA has the authority to do so). It simply refuses to reveal whether it ever exercises this discrete review authority. This would appear to be an unquestionably valid exercise of the Subcommittee's oversight authority. If OIRA is never exercising such review authority, or is doing so in a manner the Subcommittee deems perfunctory, it is a matter it may deem of legislative concern requiring remedial action. Also, it is within the prerogative of the Subcommittee to *suggest* that in the future that OIRA record instances in which it has vetoed certain requirements. Of course, it may not require OIRA to do so,[76] but the agency's refusal to do so would provide further impetus for remedial legislation. To hold the Director of OMB in contempt for what may in fact be obdurate refusals to implement the law the way Congress intended, might be seen as a bald attempt to circumvent the limitations placed on the exercise of legislative power by *Chadha*.

A more direct and effective (and certainly more constitutional) manner of achieving compliance would be through the authorization and appropriations processes. Legislation directing that OIRA periodically report publically when and how it has rejected particular requirements of ICR's could be explicit. Indeed, Executive Order 12, 866,[77] which governs OIRA review of agency rulemakings, requires that an agency must identify, in the Federal Register notice accompanying the proposed rule, any changes it has made at the suggestion of OIRA. It would appear anamalous that an Administration policy voluntarily adopted to publically disclose OIRA impact in a closely analogous area, is unacceptable for OIRA Paperwork Act actions.

Similarly, the appropriations process could be used as a remedy in other areas in dispute. Your Subcommittee believes that assigning one full time employee (FTE) to Internal Revenue Service ICRs, which represent an estimated 80% of federal paperwork burden, is inadequate. Appropriations legislation could require assigning a specific number of FTE's to IRS paperwork. Finally, OMB's appropriation (not OIRA's) might be directly tied to its success in achieving annual paperwork reductions by reducing it proportionately by the percentage it fails the reduction quota. While draconian, the very suggestion might spur greater voluntary agency efforts.

Similarly, the failure of OMB to fully comply with a statutory direction[78] to issue guidance to agencies with respect to several important interpretative issues that have

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[75] 44 U.S.C. 3505 (a).

[76] See, *INS* v. *Chadha*, 462 U.S. 919 (1983).

[77] 58 Fed. Reg. 51,735 (1993), *reprinted in* 5 U.S.C. 601 note (1994).

[78] Omnibus Consolidated Appropriations Act, Pub. L. 105-277, 112 Stat. 2681 (1998).

impeded the effective implementation of the 1996 Congressional Review Act[79] has caused the Subcommittee concern. The guidance failed to include a discussion of agency documents covered by the term "rule", a statement with respect the judicial reviewability of effectiveness of covered rules that are not reported for congressional review, and clarification on whether the "good cause" exemption may be used for rules previously subject to notice and comment. Legitimate disagreements between the executive and subsequent Congresses on the interpretation of statutory provisions are traditionally resolved by legislative remediation or judicial construction in the course of litigation, not through the contempt process.

Finally, we turn to the June 26, 1998, subpoena to OMB Director Jacob Lew for information on a proposed increase in funding for the White House Initiative on Global Climate Change. A full response has been long delayed. OMB has conceded that it did not conduct a complete search for the matter encompassed by the subpoena. For example, despite a direction to provide all documents on the subject, OMB included only documents originated by OMB or with handwritten comments made by OMB, but not pertinent documents sent to OMB. Also, as part of its search effort, OMB did not contact all OMB offices or issue written directions to staff to guide the search for pertinent documents. More recently, with the revelation that several years of White House e-mails encompassing the period covered by the subpoena were known to be missing because of a computer malfunction which was not disclosed and which may contain information pertinent to your Global Climate Change technology inquiry, further delays in receiving a full response may be anticipated.

The situation with respect to the Climate Change subpoena may be an appropriate candidate for contempt action. The delay in response is now nearly two years. The initial partial response is inexplicable in view of the specificity of the subpoena. The failure to give explicit written directions to staff with respect to the search for documents was apparently an abrupt departure from normal agency practice upon receipt of a congressional subpoena. The Subcommittee has been patient in its pursuit of the documents, even soliciting the aid of a Senator who put a temporary hold on the nomination for a high Department of Energy position of the OMB official responsible at the time for monitoring the climate change funding initiative. In this instance, the Subcommittee's decision whether to initiate contempt proceedings may not only properly take into account the nature of the agency's actions in withholding of subpoenaed documents, but also the pattern of resistance to Subcommittee oversight efforts by the agency over the same period of time. Such patterns have been utilized in the past to buttress a particular instance of noncompliance.[80]

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[79] 5 U.S.C.A. 801 *et* seq. (1999).

[80] See, *e.g.*, "Proceedings Against John M. Quinn, David Watkins, and Matthew Moore (Pursuant to Title 2, United States Code, Sections 192 and 194), H.R. Rept. No. 104-598, 104th cong. 2d Sess. 27-34 (1996) (recounting pattern of White House "stonewalling" of previous committee investigations).